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Supreme Court, U.S.
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In The

Supreme Court Of The United States

BRIAN K. MURPHY,
Petitioner,

v.

BERNALE BRYANT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

CONNECTICUT COMMISSIONER OF CORRECTION'S PETITION FOR WRIT OF CERTIORARI WITII ATTACHED APPENDIX

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QUESTION PRESENTED

Whether the Connecticut Supreme Court misapplied United States Supreme Court precedent and improperly overturned a conviction for a brutal homicide by ignoring *Strickland v. Washington*'s strong admonition to assess counsel's performance with appropriate deference and, instead found that counsel's performance was deficient based entirely on speculation and conjecture?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Brian K. Murphy, acting Commissioner of Correction for the State of Connecticut, respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, entered in this proceeding on March 10, 2009.[1]

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[1] When this case was litigated in state court, the Commissioner of Correction for the State of Connecticut was Theresa Lantz. Commissioner Lantz retired on June 30, 2009 and the petitioner herein, Brian K. Murphy, was appointed to serve as acting Commissioner of Correction effective July 1, 2009.

OPINION BELOW

The opinion of the Connecticut Supreme Court reported as *Bryant v. Commissioner of Correction*, 290 Conn. 502 (2009) reh'g denied (April 21, 2009), which reversed the decision of the Connecticut Appellate Court and upheld the state habeas court's ruling granting the respondent habeas corpus relief, is the subject of this petition. The opinion and the state supreme court's order denying reconsideration and reargument are reprinted in the appendix.

JURISDICTION

The decision below was released on March 10, 2009. The petitioner's motion for reconsideration and and reargument en banc was denied on April 21, 2009. This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rule 10(c).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[N]o State shall ... deprive any person of life, liberty or property without due process of law...."

RELEVANT STATUTORY PROVISIONS

Connecticut General Statutes § 53a-55(a)(1) provides, in pertinent part, as follows:

> A person is guilty of manslaughter in the first degree when ... with intent to cause serious physical injury to a person, he causes the death of such person....

RELEVANT RULES OF THE UNITED STATES SUPREME COURT

Rule 10 provides, in pertinent part, as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. Any petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> ***
>
> (c) a state court ... has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

STATEMENT OF THE CASE

In *Bryant v. Commissioner of Correction,* supra, the respondent was convicted of manslaughter in the first degree, in violation of Connecticut General Statutes § 53a-55(a)(1), for stomping his victim to death in a "drug deal gone bad." The evidence in the case showed that the victims drove off without paying for their drugs, but collided with another vehicle as they fled. The respondent dragged both victims from the wreck and stomped them, killing one and injuring the other. When questioned by the police, the respondent admitted being at the scene of the accident, but denied assaulting the victims. His statement suggested that the injuries suffered by the deceased victim were the result of the collision. The respondent was convicted at trial because the massive blunt trauma suffered by the deceased victim was not consistent with an injury sustained in an automobile accident and was obviously the result of a beating. In addition, the surviving victim and a bystander testified that they saw the respondent stomping the deceased victim. Finally, forensic evidence, including DNA analysis of blood from the victim that was sprayed on the front grill of the car, corroborated the eyewitness testimony.

In his habeas corpus petition, the respondent claimed that his defense counsel was ineffective in failing to present a defense that the victim was killed by being shot in the head by an unknown gunman. There were numerous problems with this defense, including the fact that: (1) the autopsy did not show a bullet wound to the victim's head or anywhere else on his body; (2) the theory of defense was inconsistent with the

respondent's statements to the police and his testimony at trial; (3) no one at the scene, including the respondent, reported seeing anyone with a gun; and (4) the theory provided no explanation for the massive blunt trauma injuries suffered by the victim. Nevertheless, the habeas court found defense counsel ineffective and granted a new trial.

The Commissioner of Correction appealed and the Connecticut Appellate Court reversed the judgment of the habeas court. *Bryant v. Commissioner of Correction*, 99 Conn. App. 434, 444 (2007). After granting the respondent's petition for certification to appeal, however, the Connecticut Supreme Court reversed the decision of the Appellate Court and restored the habeas court's order granting a new trial. *Bryant v. Commissioner of Correction*, 290 Conn. at 527.

A. The Respondent's Criminal Trial

The respondent was charged with murder, in violation of Connecticut General Statutes § 53a-54a, in connection with the death of Edward Jones. At the respondent's trial, Gary Fournier testified that during the early morning hours of April 14, 1996, he and Jones decided to steal cocaine from drug dealers working in the vicinity of Irving Street and Albany Avenue in Hartford. Fournier and Jones planned to obtain the drugs and drive off without paying for them. T. at 608-11.[2] Fournier and Jones drove to Irving Street and were approached by a drug dealer named Terry Davis. Davis

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[2] T. refers to the transcript of the petitioner's trial in *State v. Bernale Bryant*, CR00-0540873, Judicial District of Hartford.

then backed away from the car and they were approached by the respondent. At that point, Fournier, who was driving the car, engaged in a drug transaction with the respondent. T. at 611-12.

When the respondent handed Fournier the drugs, he drove off without paying for them. The respondent grabbed onto the car and ran down the street with it until he dropped off as Fournier drove through the stop sign at Albany Avenue. When Fournier's car entered the intersection, it collided with a sport utility vehicle (SUV), spun around and struck a telephone pole. T. at 614-15. After the accident, the respondent dragged Fournier out of the car, pushed him to the ground and kicked him. Fournier testified that after kicking him for about fifteen seconds, the respondent went back to the car and dragged Jones out. Fournier then went to a nearby building and sat on the steps. From that location, Fournier watched the respondent beat and kick Jones at the front of the car. T. at 616-18.

Fournier's testimony was corroborated by Ewan Sharp, a witness to the incident. At the hearing in probable cause, Sharp testified that at the time of the incident, he was on the corner of Magnolia Street and Albany Avenue, one block from Irving Street.[3] Sharp testified that he heard the sound of squealing tires and looked in the direction of Irving Street. When he did so, he saw a car proceeding from Irving Street onto Albany

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[3] Article First, § 8, of the Connecticut Constitution provides that "[n]o person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law...."

Avenue. Sharp saw a man fall off the car and roll into the street. The car was struck by another vehicle that was traveling on Albany Avenue. The collision caused the car to spin around and strike a telephone pole. Sharp recognized the man who fell off the car as the respondent. T. at 925-30, 943-49.

Sharp testified that he ran to Irving Street after the collision. When he arrived at the scene, Sharp saw the respondent pulling a man out of the car. The respondent then kicked and beat the man for five to ten seconds. Sharp testified that the respondent searched the man's pockets before he ran off toward Garden Street. T. at 930-35, 949-51, 957-61. Sharp testified that blood was "gushing" from the man's neck after the respondent left him lying in the street. T. at 978.[4]

Terry Davis, the drug dealer who had initially approached Fournier and Jones, testified that he saw the respondent engaging in a transaction with the two men, and then saw them drive off with the respondent holding onto the window frame and running beside the car. T. at 310-14. He also saw the car run a stop sign and collide with a truck. Davis testified that the respondent "barely got off the car" before the "moment of contact" with the truck. Davis then saw the respondent get up and run across Albany Avenue. T. at 316, 322. After witnessing the collision, Davis went the other direction on Irving Street toward Homestead Avenue. After a few minutes, Davis went back down

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[4] Sharp refused to testify at the petitioner's trial; T. at 912; but his testimony at the hearing in probable cause was read into the record. T. at 925-89.

Irving Street to the intersection of Albany Avenue. T. at 316-17, 322-23. When he arrived at the scene, Davis saw the passenger from the car lying face down in front of the car bleeding from his head. T. at 316-19.

Dr. Arkady Katsnelson, the medical examiner who performed the autopsy on the victim, testified that Jones suffered extensive and multiple contusions and lacerations to the head and face and contusions and abrasions to the chest and upper abdomen. The victim also suffered extensive fractures in the maxilla, or upper jaw, and suffered three broken ribs. T. at 522-28, 539. The victim suffered "multiple and extensive fractures of the skull" as a result of six separate blows to the head. T. at 534-36. When Katsnelson opened the victim's head, he did not need to use a saw because the skull was so extensively fractured. Fragments of broken bone had lacerated the membrane which covers the brain, as well as the brain itself. There was a transection of the victim's brain, which means a complete laceration and separation of one part of the brain from another due to an extremely forceful blow. T. at 535-38. Katsnelson testified that he observed no other injuries to the victim and that the cause of death was blunt trauma to the head. T. at 540-41. Finally, Katsnelson testified that the victim's injuries were inconsistent with injuries caused in a motor vehicle accident. T. at 547-48.[5]

Steven Grabowski, a detective from the Hartford Police Department, testified that when he interviewed

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[5] At the hearing in probable cause, Dr. Katsnelson specifically testified that there were no gunshots wounds or stab wounds on the victim's body. T. at 174-75.

Fournier at the hospital, he was uncooperative, intoxicated and unable to express himself clearly. T. at 703-705. Grabowski also testified that in November, 1997, the respondent gave him a written statement regarding his participation in the incident. T. at 742, 758. Finally, Grabowski testified that while he was at the scene of the accident, he observed blood spatter on the front license plate of Fournier's car. T. at 700.

Dr. Heather Coyle, a criminalist from the state crime lab, testified that the DNA profile of the blood on the license plate was an exact match for the DNA profile from a sample of the victim's blood. T. at 899-905.

The respondent testified on his own behalf at trial. In his testimony, the respondent denied selling drugs and claimed that he approached Fournier's car because "[he] was just being nosy." He testified that when Fournier sped off, he just "didn't let go of the car" and rode it to the intersection. T. at 1038. The respondent testified that after the crash, he went to the car and saw Jones on the ground and Fournier walking away from the wreck. He claimed that he stayed on the scene only briefly before departing. T. at 1040-43, 1065.

The respondent's testimony was consistent with the statement that he had given to Detective Grabowski and an oral statement that he gave to Detective Keith Knight in April, 1996. T. at 761-62, 383-86, 1036-43.[6]

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[6] The respondent concluded the sworn statement that he gave to Detective Grabowski by stating that "I can honestly say that no one touched [the victims]. T. at 762; State's Exhibit 49A.

On October 27, 2000, the jury returned a verdict of not guilty on the charge of murder but guilty of the lesser included offense of manslaughter in the first degree, in violation of Connecticut General Statutes § 53a-55(a)(1). T. at 1307-1308. Thereafter, the trial court sentenced the respondent to imprisonment for nineteen years. T. at 1336. The respondent appealed and the Appellate Court affirmed his conviction. *State v. Bryant*, 71 Conn. App. 488, cert. denied, 261 Conn. 939 (2002).

B. The Hearing on the Respondent's Habeas Corpus Petition

In his state petition for a writ of habeas corpus, the respondent claimed that his conviction was obtained in violation of his Sixth Amendment right to the effective assistance of counsel. "Amended Petition" at 5, *Bryant v. Warden*, Case No. CV03-0003933-S, Judicial District of Tolland.[7] In his petition, the respondent alleged that his trial counsel, Assistant Public Defender David Smith, was ineffective for numerous reasons. At the hearing on his petition, however, the respondent's counsel focused on a claim that Smith was ineffective in failing to present a defense that the victim was fatally shot by an unknown gunman rather than being kicked and beaten to death by the respondent.

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[7] The respondent also claimed that his conviction violated his right to the effective assistance of counsel under Article First, § 8, of the Connecticut Constitution. "Amended Petition" at 5, *Bryant v. Warden*, supra. The Connecticut Supreme Court has held, however, that "the state and federal constitutional standards for review of ineffective assistance of counsel claims are identical." *State v. Drakeford*, 261 Conn. 420, 431 (2002), quoting *Aillon v. Meachum*, 211 Conn. 352, 355-56 n.3 (1989).

The respondent called Thomas Davis, the driver of the vehicle that struck the victims' car, as a witness at the habeas hearing. Davis testified that on April 14, 1996, he was working as an armed security guard for Metro Loss Prevention Services. Davis testified that during the early morning hours of that day, he was driving an SUV owned by his employer on Albany Avenue in Hartford. As he approached the intersection of Irving Street, Davis testified that he heard several gunshots that he thought had come from the gas station at the corner. T. 1/19/05 at 16.[8] Davis then saw a small, blue car coming out of Irving Street. When the car drove through the intersection, Davis' vehicle collided with it and caused it to spin around and strike a telephone pole. Davis' vehicle came to rest with its rear window facing the blue car. T. 1/19/05 at 17-18.

Davis testified that three or four seconds after the collision, a white "late seventies model Lincoln or Cadillac" came out of Irving Street. The white car was occupied by a driver and a passenger. The car stopped and the passenger got out and approached Davis. Davis described the passenger as a "light-skinned Spanish male." T. 1/19/05 at 18-19. Davis testified that the passenger had an "item" in his hand that he "couldn't identify." Davis stated, however, that "[a]t that time of night, and in that area" he assumed that the item was a gun. T. 1/19/05 at 19-20, 46. Davis took out his sidearm and displayed it to the man. Upon seeing the weapon, the man looked startled, "turned and went up

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[8] Citations to the transcript of the hearing on the respondent's habeas petition are signified by 'T. followed by the date on which the testimony to which reference is made was given.

to the corner where the car accident was." Davis testified that the white car then left the scene. T. 1/19/05 at 19-21.

Davis testified that after the vehicles came to rest, there "was lots of chaos" at the scene and that there were "several people out there jumping up and down." Davis stated, however, that he "wasn't too sure what was going on." T. 1/19/05 at 22. Davis testified that he saw one man exit the car and stumble toward the "front stoop" of a package store where he sat down. He stated that neither occupant was dragged from the car and that he did not see anyone kick or beat the men. T. 1/19/05 at 21, 23-24. Davis testified that he assumed that the gunshots that he heard, the large white car and the blue car with which he had collided were all connected. T. 1/19/05 at 21, 47. He acknowledged, however, that "[g]unshots in the north end of Hartford every night are ... a common thing." T. 1/19/05 at 21.

The respondent also called Melissa Young-Duncan as a witness. Young-Duncan testified that on April 14, 1996, she was employed as an Emergency Medical Technician (EMT) by L & M Ambulance Service. She testified that at 1:30 a.m., she was dispatched to the scene of a motor vehicle accident at the intersection of Irving Street and Albany Avenue. Upon her arrival, Young-Duncan observed a car that had come to rest next to a telephone pole and a man lying next to it. Young-Duncan testified that when she examined the man, she observed "[w]hat appeared to be a gunshot ... [t]o his left temple." T. 1/7/05 at 5-9. She testified that the wound she observed was "perfectly round and was the same size as a bullet." She testified

that based on her training, she concluded that the wound she observed was a gunshot wound. T. 1/7/05 at 9-11.

Young-Duncan testified that at the time of the incident, she had trained to the level of "EMT Intermediate." She testified, however, that she had received no training on gunshot wound identification prior to the incident. T. 1/7/05 at 10. On cross-examination, Young-Duncan testified that she spent a total of about twenty minutes with the victim on the night of the incident. T. 1/7/05 at 19-20.

The respondent also called John Gartley as a witness during the presentation of his case. Gartley testified that on April 14, 1996, he was employed as a paramedic by L & M Ambulance Service. He testified that his partner that night was Melissa Young-Duncan. Gartley testified that at 1:33 a.m. on that date, they were dispatched to the intersection of Irving Street and Albany Avenue. T. 1/7/05 at 23-25. When Gartley arrived at the scene, he observed a car that had come to rest near a telephone pole and a man lying on the ground nearby. T. 1/7/05 at 25-27.

When Gartley began to attend to the man, he observed what he believed to be a gunshot wound in the man's left temple. T1. at 28. Gartley testified that he believed the wound that he observed was a gunshot wound for the following reasons:

> First, it was a small circular-type hole, maybe the roundness of a of a pencil.... There was some tissue protruding back out of the hole, which is normal for a gunshot wound of that type, and there was some black residue around the hole, possibly, you know, like a powder burn ... from a close-range shot.

T. 1/7/05 at 28. Gartley testified that he received training in gunshot wound identification during his one year of paramedic training at Capital Community Technical College. T. 1/7/05 at 29.

On cross-examination, Gartley testified that the victim had suffered numerous other injuries. He testified that "[t]here were multiple contusions ... bruises, some swelling and what appeared to be a boot print on him." T. 1/7/05 at 30. On redirect examination, the respondent's counsel asked Gartley if he were certain that he had observed a boot print on the victim. Gartley replied "Well, I can't be exactly sure. It looked more like a boot than a shoe print." T. 1/7/05 at 34.

The petitioner also called Rene Fleury at the hearing. Fleury testified that in April 1996, she was engaged to Gary Fournier and shared an apartment with him. T. 1/19/05 at 4-5. On Saturday, April 13, 1996, Fleury allowed Fournier to drive her 1995 Ford Escort to work. Fournier did not come home that night and when Fleury arose the next day, Fournier had still not returned to their apartment. Fleury testified that she went to work at 7:00 or 8:00 a.m. that day. T. 1/19/05 at 6-7.

Sometime after Fleury arrived at work, Fournier came to the restaurant where she was employed. Fournier told her that he had been involved in an automobile accident. Fleury decided to leave work and return with Fournier to their apartment. T. 1/19/05 at 7-8. Fleury testified that Fournier was badly bruised and cut up. He was not very mobile and it took Fleury and a friend to "get him up to the apartment and into bed." As they were getting Fournier into bed, Fleury again asked him about the incident. Fournier said something about three Spanish guys with a gun. T. 1/19/05 at 8-9. She testified that she asked Fournier for more information, as follows:

> I asked him, again, what had happened that night, he told me that he got in a car accident, and that Eddy, the other gentleman in the car, got beat up, and he got beat up, and that was pretty much all I ever got out of him.

T. 1/19/05 at 9.

Fleury later gave a statement to the police regarding Fournier's behavior on that morning. In her statement, Fleury indicated that as she was putting Fournier to bed, he said "something about three Spanish guys with a gun, but nothing he said made any sense." Petitioner's Exhibit 2, *Bryant v. Warden*, CV03-0003933-S, Judicial District of Tolland.

Based on the testimony of these four witnesses, the habeas court granted the petition and ordered a new trial. "Memorandum of Decision," *Bryant v. Warden*,

supra, at 17. In its decision, the habeas court ruled that the petitioner's trial defense counsel provided "inadequate representation" because he had failed to introduce "available and credible evidence of a clearly exculpatory nature" at the petitioner's trial. Id., at 13.

In reaching this decision, the court contrasted the testimony of the four witnesses called by the petitioner at the habeas hearing (Thomas Davis, Young-Duncan, Gartley and Fleury) with that of Ewan Sharp, whose testimony from the probable cause hearing was read into evidence at the petitioner's trial. "Memorandum of Decision," *Bryant v. Warden*, supra, at 13-14. The court found the credibility of the four witnesses to be "considerable and compelling." Id., at 13. The court found, therefore, that the testimony offered by the four witnesses "could easily have led a jury to harbor a reasonable doubt as to the guilt of the petitioner." Id., at 14. Accordingly, the court concluded that "it was deficient performance on the part of trial defense counsel not to present this testimony at the petitioner's original trial." Id. The court also concluded that the petitioner was prejudiced by the failure to call these witnesses "[g]iven the significance of [their] potential exculpatory testimony and its propensity to induce reasonable doubt in the minds of the jury." Id., at 14-15.

Nonetheless, the habeas court conceded that "there are some contradictions in the record." Memorandum of Decision," *Bryant v. Warden*, supra, at 16. The habeas court noted that the medical examiner's report "found no evidence of a gunshot wound to the head." In order to explain this anomaly in its theory, the habeas court speculated that "*it is not impossible*

that the force of the impact of the collision, coupled with a gunshot wound to the head and emergency medical treatment at the trauma center that a severe fracturing of the skull *might* have masked the existence of the gunshot wound by the time of the post-mortem examination." (Emphasis added.) Id. The habeas court also noted that the petitioner's testimony at trial refuted the existence of a white Cadillac and a shooting before the collision. The court dismisses this significant flaw in its logic simply by stating that the petitioner did not claim "actual innocence." Id. The court concluded, therefore, that "[t]he jury were entitled to hear this testimony before they made the finding of guilty." Id.

C. Appellate Review of the Habeas Court's Decision

The Commissioner of Correction appealed from the judgment of the habeas court and the Connecticut Appellate Court reversed. *Bryant v. Commissioner of Correction*, 99 Conn. App. at 444. After granting the respondent's petition for certification to appeal, however, the Connecticut Supreme Court reversed the decision of the Appellate Court and restored the habeas court's order granting a new trial. *Bryant v. Commissioner of Correction*, 290 Conn. at 527.

1. Decision of the Connecticut Appellate Court

In reversing the habeas court's ruling, the Appellate Court held that the respondent had failed to show that the performance of his trial counsel was deficient under *Strickland v. Washington*, 466 U.S. 668,

687-91, reh. denied, 467 U.S. 1267 (1984). *Bryant v. Commissioner of Correction*, 99 Conn. App. at 443-44. The court noted that the respondent "did not indicate in either of his statements to the police, or in his testimony at his criminal trial, that there was an unknown gunman involved in the April 14, 1996 incident." Id., at 443. The court concluded, therefore, that "the presentation of a defense regarding an unknown gunman would have been rendered implausible by the petitioner himself." Id. The court further observed that:

> [I]n developing the [respondent's] defense, [Assistant Public Defender] Smith weighed the testimony of Young-Duncan and Gartley and determined that they were entirely unsupported by any other evidence. No other witness indicated the presence of a gun at the scene, including the [respondent]. Additionally, the medical examiner's report and the records from Saint Francis Hospital and Medical Center belied such contention because there was no [stippling] or gunshot residue on the head of the victim, there was no indication of an entrance wound or exit wound and there were no lead fragments found inside the victim's head.

Bryant, 99 Conn. App. at 443.

Accordingly, the court concluded that "Smith's decision not to call the four witnesses was a matter of trial strategy." *Bryant v. Commissioner of Correction*, 99 Conn. App. at 444. The court further stated that:

> Contrary to our settled law, the [habeas] court *did not accord any deference* to Smith's tactical decision or make *any attempt to evaluate his conduct from his perspective* at the time of the [respondent's] criminal trial. Rather, the court employed hindsight to retry the case as if the omitted testimony had been offered and admitted, and the court *engaged in speculation* that the testimony would have been credited even though it was inconsistent with the [respondent's] version of events and all the forensic evidence.

(Emphasis added.) *Bryant*, 99 Conn. App. at 444. Consequently, the Appellate Court concluded that the habeas court "improperly determined that the performance of counsel was deficient." Id.

2. Decision of the Connecticut Supreme Court

On appeal to the Connecticut Supreme Court, the respondent claimed that the Appellate Court had erred in ruling that his trial counsel's failure to present a defense that the victim ~~was~~ shot in the head by an unknown gunman did not constitute ineffective assistance of counsel. *Bryant v. Commissioner of Correction*, 290 Conn. at 503. The court began its analysis of the respondent's claim by noting that in order to prevail, the respondent had to show that the performance of his counsel was deficient and that he was prejudiced by that deficient performance. Id. at 510.

The court further noted that "[j]udicial scrutiny of counsel's performance must be highly deferential...." *Bryant v. Commissioner of Correction*, 290 Conn. at 512, quoting *Strickland v. Washington*, 466 U.S. at 689. The court observed, therefore, that "[a] fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Bryant*, 290 Conn. at 512, quoting *Strickland*, supra, 689.

In conducting its analysis, the Connecticut Supreme Court first determined whether evidence of the unknown gunman would have been admissible under Connecticut law as third party culpability evidence. *Bryant v. Commissioner of Correction*, 290 Conn. at 514-15. The court concluded that because the evidence in question established a direct connection between a third party and the charged offense, it was relevant to the issue of the respondent's guilt or evidence. Id., at 515.

Nevertheless, the court observed that "[i]t is not ineffective assistance of counsel ... to decline to pursue a third party defense when there is insufficient evidence to support that defense. *Bryant v. Commissioner of Correction*, 290 Conn. at 515, citing *Dunkley v. Commissioner of Correction*, 73 Conn. App. 819, 827 (2002), cert. denied, 262 Conn. 953 (2003). In this case, however, the court found that "the testimony of Davis, Young-Duncan, Gartley and Fleury would have worked in to create a credible scenario in which the cause of [the victim's] death was a gunshot wound to the head perpetrated by a small group of unidentified Hispanic

males driving a white Cadillac or Lincoln, not the actions of the [respondent]." *Bryant,*, 290 Conn. at 516.

Accordingly, the court stated that under Connecticut's "third party culpability rules, the testimony tending to show that the unidentified Hispanic males with a gun were responsible for [the victim's] death would have been relevant to the jury's determination of whether there existed a reasonable doubt as to the [respondent's] guilt." *Bryant v. Commissioner of Correction*, 290 Conn. at 517. The court concluded, therefore, that "the failure to present this relevant, plausible third party culpability defense constituted deficient performance on the part of defense counsel under *Strickland*." Id., at 517-18.

The Connecticut Appellate Court concluded that the decision of the respondent's trial counsel, Attorney Smith, not to rely on the "unknown-gunman" defense was reasonable because of two significant weaknesses in the theory. First, the Appellate Court noted that respondent himself did not mention that a gunman was involved in the incident in either of his statements to the police or in his testimony at trial. *Bryant v. Commissioner of Correction*, 99 Conn. App. at 434. Second, the court noted that neither the autopsy of the victim nor the medical records of his treatment revealed the existence of a gunshot wound. Id.

The Connecticut Supreme Court dismissed these concerns. First, the court stated that it was "possible that the [respondent] simply did not hear the gunshots or see the white vehicle and the unidentified Hispanic males" when they drove up to the scene of the accident

and shot the victim in the head. *Bryant v. Commissioner of Correction*, 290 Conn. at 520 n.14. Second, the court stated that the testimony of Dr. Katsnelson, the medical examiner who conducted the autopsy, "was not irrefutable." Id., at 525. The court suggested that Dr. Katsnelson's credibility could have been successfully challenged on cross-examination by confronting him with the opinions of the Young-Duncan and Gartley, the emergency medical personnel who treated the victim on the night of the incident. Id., at 526 n.22. Accordingly, the court was not "persuaded by the state's argument that deference to trial strategy saves Smith's actions." Id., at 521.[9]

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[9] The two concurring justices agreed that Attorney Smith provided ineffective assistance, but they did not agree that he ineffective for failing to present a defense that was predicated on the theory that the victim was shot to death by a small group of unidentified Hispanic males. *Bryant v. Commissioner of Correction*, 290 Conn. at 527-28 (*Palmer, J.*, concurring). The concurrence concluded that Smith was ineffective in failing to present the testimony of Thomas Davis, the driver of the SUV, to refute the state's theory that the respondent beat the victim to death. Id., at 528. The concurrence stated that Davis would have testified that he was at the scene in the aftermath of the collision and that he did not see the victim being beaten. Id., at 536. The concurrence concluded, therefore, that "Davis's testimony is unassailable and casts grave doubt on the only evidence that the state adduced implicating the petitioner in Jones's [killing]." Id.

REASONS FOR GRANTING THE WRIT

In *Strickland v. Washington*, this Court struck a delicate balance between the right of defendants to a fair trial and the interest of the states in the finality of their criminal judgments. *Strickland* did this by permitting defendants to obtain relief on claims of ineffective assistance of counsel but by also imposing stringent standards for obtaining such relief. The Court held that a claim of ineffective assistance of counsel has two components. The Court stated that:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so egregious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires that showing that counsel's unprofessional errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

The *Strickland* court was well aware that when assessing the performance of defense counsel, it would be "all too tempting to second-guess counsel's assistance after conviction...." *Strickland v. Washington.*, 466 U.S. at 689. The court concluded, therefore, that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. The court stated that "[a] fair

assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at the time." Id.

Indeed, Justice O'Connor, writing for the court in *Strickland*, warned that:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Strickland v. Washington, 466 U.S. at 690. The Connecticut Supreme Court's decision in this case, as well as decisions by the courts of other states, make it all too clear that precisely what Justice O'Connor feared has come to pass.

In the twenty-five years since *Strickland* was decided, there has been an erosion of the stringent standards established in that case to a point where absurd decisions, such as the one by the Connecticut Supreme Court in *Bryant v. Commissioner of Correction*, are possible. Indeed, the courts of other states have decided cases with equally egregious results. See, e.g., *Anfinson v. State*, 758 N.W. 2d 496 (Iowa 2008) (in case involving drowning of infant, counsel ineffective for failing to raise a post-partum depression defense even though such defense would have been inconsistent with defense claim of accident); *Commonwealth v. Hill*, 432 Mass. 704, 717-20 (2000) (counsel ineffective for failing to call witness whom he deemed to be hostile, lacking in credibility because of drug use and whose description of the perpetrator fit the defendant to some degree); *In re Maxfield*, 133 Wash.2d 332, 344 (1997) (counsel ineffective for failing to raise previously unrecognized state constitutional right to privacy in public utility records).

The decision of the Connecticut Supreme Court in *Bryant v. Commissioner of Correction* is not an aberration, but is, rather, an extreme example of a common problem throughout the country. Accordingly, this Court should grant certiorari in this case to better define the scope of "reasonableness under prevailing professional norms," *Strickland*, supra, 688, to provide guidance to lower courts regarding the application of "highly deferential" review, id., at 689, and to correct the egregious misapplication of *Strickland* in this case.

A. The Connecticut Supreme Court Failed to Afford Appropriate Deference to Decisions Made by Respondent's Counsel

In *Strickland v. Washington*, this Court held that in order to prevail on a claim of ineffective assistance of counsel, the petitioner must show that show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment..." Id., 466 U.S. at 687. Moreover, the Court stated that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id., at 689.

While the Connecticut Supreme Court acknowledged this standard, it failed to heed the this Court's strong admonition against second-guessing the decisions of trial counsel. Instead, the court substituted its own judgment for that of the trial counsel, and concluded that there was a better defense available to the petitioner. In doing so, the court overlooked the fact that "the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable." *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th Cir.), cert. denied, 525 U.S. 839 (1998); see *Bloom v. Vasquez*, 840 F. Supp. 1362, 1369 (C.D. Cal. 1993) (ability to fashion different, or even better, defense is irrelevant if defense presented was a reasonable tactical decision).

In this case, the trial counsel's decision not to base the petitioner's defense on the theory that the victim was shot to death by an unknown gunman was

entirely reasonable. As the Connecticut Appellate Court noted, the respondent "did not indicate in either of his statements to the police, or in his testimony at his criminal trial, that there was an unknown gunman involved in the ... incident." *Bryant v. Commissioner of Correction*, 99 Conn. App. at 443. A defense based on the existence of such a gunman, therefore, would have been completely implausible. Moreover, none of the witnesses, including the respondent, were able to say that they saw a gun at the scene. Finally, the autopsy report included no indication that the victim had been shot. As the Appellate Court noted, "the medical examiner, who had more than twenty years of experience and performed thousands of autopsies, testified that the victim had sustained several injuries to various parts of his body as the result of blunt trauma and that the cause of the victim's death was blunt trauma to the head." Id. The defense proposed by the respondent in his habeas corpus petition offered no explanation for these injuries.

In addition, the state supreme court failed to consider that the petitioner was originally charged with murder. When faced with such a serious charge, a prudent defense counsel would certainly be reluctant to base his client's defense on a tenuous theory with such obvious disadvantages. Indeed, in *United States v. Cronic*, 466 U.S. 648 (1984), this Court observed that "[i]f there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." Id., at 657 n.19.

Finally, the Connecticut Supreme Court compounded its error by resorting to speculation and conjecture to support its conclusion that counsel's decision not to rely on a defense that the victim was shot by an unknown gunman constituted deficient performance. The most daunting obstacle to a defense that the victim was shot to death is the absence of any indication in the autopsy report that he suffered a gunshot wound. The court suggests, with absolutely no basis for doing so, that the medical examiner's "testimony was not irrefutable." *Bryant v. Commissioner of Correction*, 290 Conn. at 525. Indeed, the court even suggests that the medical examiner's testimony could have been impeached by confronting him with the observations of the paramedic and the EMT who treated the victim at the scene. Id., at 526 n.22. It is, of course, highly unlikely that an experienced medical examiner would admit an egregious professional error when confronted with the fact that the emergency personnel who treated the victim disagreed with his conclusion. The court also dismissed the troubling fact that the petitioner never mentioned a gunman in any of his statements to the police with the implausible suggestion that the petitioner simply failed to notice when the victim was shot to death in his presence. Id., at 521 n.14. It is difficult to imagine, however, that the petitioner could have failed to notice three men pursuing the victim in a white Cadillac and then shooting him in the head at close range.

If the standards established in *Strickland* and this Court's guidance with regard to claims of ineffective assistance are to have any meaning, they must be upheld and enforced by the Court. Accordingly, this

Court should grant certiorari to correct the egregious misapplication of *Strickland* by the Connecticut Supreme Court in this case.

B. Failure to Afford Appropriate Deference to Trial Counsel in Other States

While the Connecticut Supreme Court's ruling in *Bryant v. Commissioner of Correction*, supra, represents an extreme example inappropriate second guessing of defense counsel by a court reviewing an ineffective assistance of counsel claim, Connecticut is by no means the only state where the highest court has failed to apply appropriate deference when evaluating the performance of counsel under *Strickland*.

For example, in *Anfinson v. State*, 758 N.W.2d 496 (Iowa 2008), the Iowa Supreme Court held that the performance of the trial defense counsel was deficient because he had failed to raise a postpartum depression defense in a prosecution for the drowning death of an infant. Id., at 505. The petitioner in *Afinson* was charged with murder as a result of the drowning death of her infant son. After reporting the child missing, the petitioner told the police that the child had drown accidentally and that she had panicked and had disposed of the body in a nearby lake. Id., at 498. At trial, the petitioner's defense counsel relied exclusively on a defense of accident. The petitioner was, nevertheless, convicted of second degree murder. Thereafter, she filed an application for post conviction relief alleging that her trial counsel was ineffective for failing to raise a defense based on postpartum

depression. Id., at 499. In the post conviction proceeding, her trial defense counsel testified that he did not want to introduce postpartum depression into the case because he was concerned that it could lead the jury to believe the petitioner had intentionally killed the child. Id. at 500 n.3. The Iowa Supreme Court, however, concluded that evidence of postpartum depression could have supported the petitioner's defense of accident, Accordingly, the court found that the defense counsel was ineffective and ordered a new trial. Id., at 505.

In *Commonwealth v. Hill*, 423 Mass. 704 (2000), the Supreme Judicial Court of Massachusetts held that the defendant was denied his right to the effective assistance of counsel because the his trial counsel had failed to call a witness who could have provided third party culpability evidence. Id. at 680. The defendant and Robert Shular were charged with the murder of an elderly man in an apartment belonging to Israel Lewis, a known drug dealer. Id., at 705-706. The Commonwealth's theory was that the defendant and Schular broke into Lewis's apartment to steal money. While they were in the apartment, they were confronted by Lewis's grandfather. A struggle ensued and the defendant shot and killed the elderly Lewis. Id., at 705.

Shular and the defendant were tried separately and Shular was tried first. Shular's attorney called Jose Ramos as a witness at the trial. Ramos, who had lived across the street from Lewis's apartment, testified that on the day of the murder, he saw a car pull up in front of the house, and a man get out. Ramos testified that the man went into the Lewis's house. A few minutes later, Ramos heard a shot. He then looked out his

window and he saw the same man running back to the car and getting in. *Commonwealth v. Hill*, supra, 717. After hearing Ramos' testimony, the jury acquitted Shular. Shular's attorney told the defendant's attorney about Ramos, but the defendant's attorney did not call Ramos as a witness at the defendant's trial. The defendant was convicted of the murder. The defendant moved for a new trial claiming that his trial counsel had been ineffective in failing to call Ramos as a witness. The defendant's attorney testified that he did not call Ramos as a witness because Ramos was extremely hostile, he was a drug user and the description of the man Ramos saw leaving the house where the victim was murdered resembled the defendant. Id. Nevertheless, the Supreme Judicial Court found that the defendant's trial counsel ineffective in failing to call Ramos as a witness at the defendant's trial. Id., at 717-18.

In the *Matter of Maxfield*, 133 Wash.2d 332 (1997), the Washington Supreme Court found that the petitioner's trial defense counsel was ineffective in failing to raise a defense based on a state constitutional right that had not been recognized at the time of the petitioner's trial. The petitioner had been convicted of cultivating marijuana in his home. The petitioner's marijuana growing operation came to the attention of the police when an official of the power company advised them of the petitioner's high level of power consumption. Id., at 335. At trial, the petitioner's defense counsel made no claim that the power company official's action violated the petitioner's constitutional rights. In the petitioner's action for post conviction relief, the Washington Supreme Court recognized for the first time a state constitutional right to privacy in public utility

records and found the petitioner's trial lawyer ineffective for not raising a claim based on that right at the petitioner's trial. Id. at 339-45.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted to correct the error of the Connecticut Supreme Court and to clarify this area of the law.

Respectfully submitted,

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July 20, 2009

No. _____

In The

Supreme Court Of The United States

BRIAN K. MURPHY,
Petitioner,

v.

BERNALE BRYANT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

APPENDIX TO CONNECTICUT COMMISSIONER OF CORRECTION'S PETITION FOR WRIT OF CERTIORARI

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BERNALE BRYANT v. COMMISSIONER OF CORRECTION
(SC 17896)

Rogers, C. J., and Norcott, Palmer, Vertefeuille and Schaller, Js.

Argued April 24, 2008—officially released March 10, 2009

Peter Tsimbidaros, for the appellant (petitioner).

Michael E. O'Hare, supervisory assistant state's attorney, with whom, on the brief, were Gail Hardy, state's attorney, and David Zagaja, assistant state's attorney, for the appellee (respondent).

Opinion

SCHALLER, J. The sole issue in this certified appeal is whether trial counsel for the petitioner, Bernale Bryant, rendered ineffective assistance by failing to present four independent witnesses whose testimony, the petitioner claims, would have supported a third party culpability defense and substantially impeached the evidence presented against the petitioner. The petitioner appeals from the judgment of the Appellate Court reversing the judgment of the habeas court, which had granted his petition for a writ of habeas corpus. On appeal, the petitioner claims that the Appellate Court improperly concluded that the performance of his trial counsel was not deficient. The petitioner contends that the defense counsel's failure to

present the witnesses constituted ineffective assistance of counsel, and that the habeas court properly rejected the argument of the respondent, the commissioner of correction, that it was a matter of trial strategy. We agree with the petitioner and reverse the judgment of the Appellate Court.

The Appellate Court's decision on direct appeal in *State v. Bryant*, 71 Conn. App. 488, 802 A.2d 224 (2002), sets forth the facts, as found by the jury, that led to the petitioner's conviction. "The jury reasonably could have found that on April 14, 1996, the [petitioner] repeatedly and seriously injured [the victim] Edward Jones, and those injuries caused Jones' death. . . .

"After drinking beer and using narcotics together, in the early morning hours . . . Gary Fournier and [Jones], drove to Irving Street and Albany Avenue in Hartford to get more narcotics. The pair planned to obtain the narcotics and drive off without paying for them. Fournier stopped his car and was approached by Terry 'T-Time' Davis, a known drug seller. Shortly thereafter, the [petitioner] approached the car and handed Fournier some cocaine.

"As soon as Fournier had the cocaine in hand, he drove off without paying for the contraband. The [petitioner] continued to hang onto the car as Fournier drove off. The [petitioner] released his hold of the car just as it ran through a stop sign and was struck by another automobile. The [petitioner] then went to Fournier's car, dragged Fournier from the car, pushed him to the ground and kicked him several times before running to the passenger's side of the car. The

[petitioner] dragged Jones through the passenger window, and hit and kicked him repeatedly while he lay on the street. The [petitioner] then ran from the scene." Id., 490. Jones subsequently was taken to the hospital, where he was pronounced dead.[1] Id., 491.

The petitioner was charged with murder in violation of General Statutes § 53a-54a. After a jury trial, the petitioner was acquitted of the murder charge, but was found guilty of the lesser included offense of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1). The petitioner appealed from the judgment of conviction to the Appellate Court, which affirmed his conviction.[2] See id., 488. Upon the

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[1] After an autopsy, the state's medical examiner, Arkady Katsnelson, concluded that the cause of Jones' death was blunt head trauma, and that the manner of death was homicide

[2] On direct appeal, the petitioner claimed that: (1) the introduction at trial of a transcript of the testimony from the probable cause hearing of an eyewitness, Ewan Sharp, violated the petitioner's constitutional right of confrontation because he was unable to cross-examine Sharp as to the benefits that Sharp had received for his testimony; and (2) the trial court violated the petitioner's constitutional right to present a defense when it prohibited him from presenting extrinsic evidence at trial as to the benefits received by Sharp for his testimony at the probable cause hearing. See *State v. Bryant*, supra, 71 Conn. App. 489-90. Sharp's testimony potentially played a significant role at trial because, upon his arrest for robbery in 1999, he told the Hartford police department that he had witnessed the accident four years prior and had witnessed the petitioner repeatedly beating Jones. Id., 491. Thereafter, the petitioner was arrested for Jones' murder. Id. The Appellate Court rejected both of the petitioner's claims on direct appeal, concluding that the petitioner had a sufficient opportunity to cross-examine Sharp at the probable cause hearing and that the exclusion of the evidence of the benefits given to Sharp for his

Appellate Court's affirmance of his conviction, this court denied the petitioner's petition for certification to appeal. *State v. Bryant*, 261 Conn. 939, 808 A.2d 1133 (2002).

Subsequently, the petitioner filed a petition for a writ of habeas corpus alleging that his confinement was illegal because he had been denied the effective assistance of counsel. The petitioner based his claim principally on his trial counsel's failure to present four independent witnesses at trial whose testimony would have supported an alternative theory of the cause of Jones' death. That theory did not implicate the petitioner, but instead implicated a small group of unidentified Hispanic men with a gun traveling in a white automobile. Trial counsel did not present this third party culpability defense to the jury. More specifically, the petitioner alleged that counsel should have called the following witnesses to testify to support that theory: Thomas Davis, the driver of the automobile that was struck by Fournier's vehicle; Melissa Young-Duncan, an emergency medical technician who responded to the scene and assisted Jones; John Gartley, a second emergency medical technician who responded to the scene and assisted Jones; and Rene Fleury, Fournier's girlfriend, who spoke with Fournier shortly after the incident. The habeas court found that the petitioner had been denied effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), because "the missing testimony could easily have led a jury to harbor a reasonable doubt as to the guilt of the

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testimony constituted harmless error. Id., 492–97.

petitioner." (Emphasis in original.) Accordingly, the habeas court set aside the petitioner's conviction, and ordered a new trial.

The respondent filed a petition for certification to appeal, which the habeas court denied. Thereafter, the respondent appealed to the Appellate Court, claiming, inter alia, that the habeas court: (1) abused its discretion by denying the petition for certification to appeal; and (2) improperly concluded that the petitioner's trial counsel was ineffective by failing to present a theory of defense that was not supported by forensic evidence or the petitioner's testimony. The Appellate Court agreed and reversed the judgment of the habeas court. *Bryant v. Commissioner of Correction*, 99 Conn. App. 434, 441–44, 914 A.2d 585 (2007). We granted the petitioner's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly reverse the habeas court's decision to grant the petitioner's writ of habeas corpus?" *Bryant v. Commissioner of Correction*, 282 Conn. 910, 922 A.2d 1098 (2007).

The following additional relevant facts found by the habeas court are necessary for our resolution of the petitioner's claim that he was rendered ineffective assistance of counsel. The habeas court heard testimony from the four witnesses whom the petitioner claims should have testified at trial: Davis, Young-Duncan, Gartley and Fleury. After hearing their testimony, the habeas court found that "[h]ad [these witnesses] testified at the petitioner's trial, it is reasonably probable that the jury could have found the following scenario to be true": Davis, a Marine Corps veteran and

gunnery specialist, employed in the Hartford area as a security guard, was driving in a company vehicle the evening of April 14, 1996. As he approached the intersection of Albany Avenue and Irving Street, Davis heard gunshots and identified them as originating from a small caliber weapon, probably a .22 caliber pistol. Immediately thereafter, Davis observed a blue Ford Escort (Ford),[3] traveling in the wrong direction, exit from Irving Street, a one-way street, onto Albany Avenue. The driver of the Ford appeared to be slumped over the wheel. A white Cadillac or Lincoln, also traveling in the wrong direction on Irving Street, pursued the Ford. Davis' vehicle collided with the Ford. Immediately after the accident, he observed the white vehicle stop and a light skinned Hispanic man exit the rear passenger seat of the vehicle.[4] The man approached Davis' vehicle carrying an object in his hand, which Davis could not see. Having heard the gunshots and believing the neighborhood to be dangerous, Davis displayed his own firearm, upon which the man went back to the white vehicle and it departed. At no time did Davis observe anyone remove the occupants from the Ford; nor did he observe anyone beat or kick them. Prior to trial, the investigator who worked for the petitioner's trial counsel had contacted and interviewed Davis, who related these events to the investigator. Davis also reported the gunshot he heard to the Hartford police department, but the police did not include his statement in their incident report. The

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[3] It is undisputed that Fournier and Jones were the occupants of the Ford.

[4] As the habeas court noted, the petitioner is African-American.

habeas court further found that Davis was available to be subpoenaed by either party at the original trial.

The court also found that a jury could have determined that Young-Duncan and Gartley are both experienced emergency medical technicians who were serving as an ambulance crew on the night of the incident. After receiving a call to assist at an automobile accident on the corner of Albany Avenue and Irving Street, they promptly arrived at the scene and provided the initial medical treatment to Jones. Both Young-Duncan and Gartley noticed what appeared to them, based on their training and experience, to be a gunshot wound to Jones' left temple. Specifically, they identified the wound as a gunshot wound based on its small size and round shape as well as what appeared to be a powder burn. Furthermore, on the other side of Jones' head, there appeared to be a powder burn that was consistent with an exit wound. Young-Duncan brought the gunshot wound to the attention of an unidentified Hartford police officer at the scene, who agreed that it appeared to be a gunshot wound.

The habeas court additionally found that a jury could have determined that Fleury, who was not at the scene but who was the owner of the Ford involved in the accident, spoke with Fournier after he had arrived home from the hospital. When she inquired about what had happened, Fournier told her that "there had been an incident with three Hispanic males and a gun."

The petitioner's trial counsel, David Smith, testified at the habeas hearing that he was aware of these four witnesses, and had reviewed all of their

statements prior to the petitioner's trial. Smith testified that he decided not to "[create] a specter of manslaughter with a firearm" by presenting these witnesses for two reasons: (1) he determined that there was no evidence to support the theory of the involvement of a gunman because there was no forensic evidence of a gunshot wound; and (2) he did not want to introduce the possibility that a gun had been involved in the incident for fear that it might "increase the likelihood of a penalty range" for the petitioner. Smith offered this justification, however, to explain only his failure to call Young-Duncan and Gartley as witnesses.

As to Davis, Smith testified that he did not call him because Davis could not be located.[5] Smith also appeared to believe that Davis' testimony could not assist in the defense of the petitioner. Specifically, Smith testified that "Davis, although he was there [at the scene], his existence or nonexistence either way did not . . . hurt [the petitioner] because he didn't say he saw someone else do something. He didn't say he saw [the petitioner] do anything." As to Fleury, Smith testified that he did not present her testimony because "[s]he was not a witness to the case. . . . [S]he didn't have any impeachment knowledge or evidence that we could have used."

We begin with the applicable standard of review and the law governing ineffective assistance of counsel

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[5] The habeas court found that Smith's investigator did locate Davis. Davis testified at the habeas hearing that he had been contacted by the trial counsel's investigator, and Davis testified that he told the investigator about the gunshot, the Hispanic males and the white vehicle.

claims. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Sastrom v. Mullaney*, 286 Conn. 655, 661, 945 A.2d 442 (2008).

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland v. Washington*, supra, 466 U.S. 686. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution." *Copas v. Commissioner of Correction*, 234 Conn. 139, 153, 662 A.2d 718 (1995). "As enunciated in *Strickland v. Washington*, supra, 687, this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Citations omitted; internal quotation marks omitted.) *Sastrom v. Mullaney*, supra, 286 Conn. 662.

The habeas court found the credibility of Davis, Young-Duncan, Gartley and Fleury to be "considerable and compelling" because all four were neutral witnesses who were not meaningfully impeached at the habeas hearing.[6] As a result, the court found that "a jury likewise would have found their testimony to be credible and highly persuasive." On the basis of this testimony, and pursuant to *Strickland v. Washington*, supra, 466 U.S. 686, the habeas court concluded that "it was deficient performance on the part of trial defense counsel not to present this testimony at the petitioner's original trial," and that "it was harmful to the petitioner and constituted inadequate representation to avoid introducing available and credible evidence of a clearly exculpatory nature in an ill-advised effort to avoid any mention of a firearm." The court also concluded that, in the absence of the deficient performance by trial counsel, the exculpatory testimony of these four witnesses could have "induce[d] reasonable doubt in the minds of the jury" and, therefore, "the reliability of the petitioner's conviction has . . . been undermined."

On appeal, the Appellate Court concluded that

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[6] Specifically, the habeas court stated, "[a]t this point, the court needs to comment upon the credibility of the four missing witnesses. In brief, it is considerable and compelling. All four of these individuals are law-abiding citizens; there was no meaningful impeachment of their testimony at the habeas trial; and, none of the witnesses knew or were in any way acquainted or associated with the petitioner. They are completely disinterested, observant, qualified and dispassionate witnesses. All of them have appropriate training that would allow them to make the statements that they did. This court, being in the best position to judge the credibility of the proffered witnesses believes that a jury likewise would have found their testimony to be credible and highly persuasive."

the petitioner had failed to satisfy the performance prong under *Strickland v. Washington*, supra, 466 U.S. 687, because he could not demonstrate that his trial counsel's representation fell below an objective standard of reasonableness. Instead, the Appellate Court determined that trial counsel decided not to call the four witnesses as a matter of trial strategy and held that the habeas court had failed to accord any deference to Smith's tactical decision or his perspective at the time of trial. *Bryant v. Commissioner of Correction*, supra, 99 Conn. App. 443–44. We disagree and conclude that the decision not to call these four witnesses was not a matter of sound trial strategy within the wide range of reasonable professional assistance.

We first address Smith's actions in light of the performance prong. "To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Internal quotation marks omitted.) *State v. Brown*, 279 Conn. 493, 525, 903 A.2d 169 (2006). "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. . . .

"Judicial scrutiny of counsel's performance must

be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." (Citations omitted; internal quotation marks omitted.) *Strickland v. Washington*, supra, 466 U.S. 688–90.

Accordingly, the question of whether Smith's

actions fell below an objective standard of reasonableness turns on whether his decision not to solicit the testimony of the four witnesses to support the third party culpability defense can be considered sound trial strategy, or whether it constitutes a serious deviation from the actions of an attorney of ordinary training and skill in criminal law. We need not decide whether Smith's failure to elicit the testimony of any particular witness would suffice because *Strickland* directs us to look at the "totality of the evidence before the judge or jury"; id., 695; keeping in mind that "[s]ome errors . . . have . . . a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture . . . ." (Internal quotation marks omitted.) *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001), quoting *Strickland v. Washington*, supra, 466 U.S. 695–96; see also *Pavel v. Hollins*, 261 F.3d 210, 228 (2d Cir. 2001) (cumulative weight of flaws deprived defendant of effective assistance of counsel). We therefore consider Smith's failure to present the mosaic of the alternative theory, a third party culpability defense, as supported by the four witnesses.

We first review the standards governing the admissibility of third party culpability evidence, mindful that the petitioner cannot prevail unless he demonstrates that his alternative theory would not be excluded. "It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the

crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." (Internal quotation marks omitted.) *State v. Arroyo*, 284 Conn. 597, 609, 935 A.2d 975 (2007).

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy." (Internal quotation marks omitted.) *State v. Ortiz*, 252 Conn. 533, 564, 747 A.2d 487 (2000). "Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." (Internal quotation marks omitted.) *State v. West*, 274 Conn. 605, 625, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005); Conn. Code Evid. § 4-1. Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, we have stated: "Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt." (Internal quotation marks omitted.) *State v. Smith*, 280 Conn. 285, 304, 907 A.2d 73 (2006). "In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be

relevant to the jury's determination. A trial court's decision, therefore, that third party culpability evidence proffered by the defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt." *State v. Arroyo*, supra, 284 Conn. 609–10.

It is not ineffective assistance of counsel, however, to decline to pursue a third party culpability defense when there is insufficient evidence to support that defense. See *Dunkley v. Commissioner of Correction*, 73 Conn. App. 819, 827, 810 A.2d 281 (2002) (no evidence to support third party claim, in part, because no one at scene implicated alleged third party), cert. denied, 262 Conn. 953, 818 A.2d 780 (2003); see also *Floyd v. Commissioner of Correction*, 99 Conn. App. 526, 531–32, 914 A.2d 1049 (insufficient evidence to substantiate third party claim when predicated on alleged testimony of unlocated drug dealers who were also gang members), cert. denied, 282 Conn. 905, 920 A.2d 308 (2007); *Santiago v. Commissioner of Correction*, 87 Conn. App. 568, 591–92, 867 A.2d 70 (third party statements did not contain sufficient substance to support viable third party claim), cert. denied, 273 Conn. 930, 873 A.2d 997 (2005); *Alvarez v. Commissioner of Correction*, 79 Conn. App. 847, 851, 832 A.2d 102 (insufficient evidence to support third party culpability defense when petitioner called only one witness at habeas hearing who did not even observe shooting), cert. denied, 266 Conn. 933, 837 A.2d 804 (2003); *Daniel v. Commissioner of Correction*, 57 Conn. App. 651, 684, 751 A.2d 398 (testimony not sufficient to raise third party culpability defense because supporting

witnesses' statements were inconsistent), cert. denied, 254 Conn. 918, 759 A.2d 1024 (2000).

In contrast, in the present case, the habeas court found that the testimony of Davis, Young-Duncan, Gartley and Fleury would have worked in concert to create a credible scenario in which the cause of Jones' death was a gunshot wound to the head perpetrated by a small group of unidentified Hispanic males driving a white Cadillac or Lincoln, not the actions of the petitioner. First, Davis' testimony supports three assertions: (1) that prior to the collision, Davis heard a gunshot, possibly from a .22 caliber weapon; (2) that Jones' car was being pursued by a white Cadillac or Lincoln; and (3) that after the collision, an unidentified Hispanic man, with an unidentified object in his hand, exited the white vehicle and briefly approached the accident scene. Moreover, his testimony also undermines the state's theory of the case. Davis was present at the crime scene from the point of impact until the time the police arrived. Yet during that period, Davis did not witness the supposedly savage and deadly beating, which, according to the state's theory, occurred at the same accident scene.[7] Second, Young-Duncan and

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[7] In referring to Jones, Davis responded to defense counsel's questions as follows during the habeas hearing:

"Q. Okay. Did you see anyone drag that person out of the vehicle? "A. No, I did not.

"Q. Did you see anyone beat that person?

"A. No, I did not.

"Q. Did you see anyone kick that person?

"A. No, I did not.

* * *

"Q. Okay. After the collision, did you remain conscious at all time[s]?

Gartley were two trained emergency medical technicians. On the basis of their testimony, a jury reasonably could have concluded that Jones had sustained a gunshot wound to the left temple area of the head, and that the autopsy performed by the state's medical examiner, Arkady Katsnelson, was potentially incomplete or inaccurate. Finally, Fleury's testimony explicitly links the testimony of Davis, with that of Young-Duncan and Gartley. Fleury testified that when Fournier arrived home that night, he stated that he had been involved in "an incident with three Hispanic males and a gun."[8] Moreover, there was no evidence in the record to suggest that any of these witnesses' statements, regarding either the gunshot or the Hispanic males, were influenced by the statements made by the other witnesses regarding those similar observations. When reviewed in its totality, the testimony of these neutral witnesses, each of whom the habeas court found to be credible and highly persuasive, creates a plausible, well supported third party culpability defense. That is, the testimony of these four disinterested witnesses, when considered as a whole, raises more than a "bare suspicion" of third party culpability. *State v. Arroyo*, supra, 284 Conn. 610. Instead, the testimony directly connects a third party to the crime—the small group of unidentified Hispanic

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"A. Yes, I did.

"Q. Did you retain a clear line of vision to the other vehicle?

"A. Yes, I did."

[8] At the habeas hearing, Fleury testified that on the evening in question, Fournier also claimed he and Jones had been "beat up . . . ."

males."[9] We therefore conclude that under our third party culpability rules, the testimony tending to show that the unidentified Hispanic males with a gun were responsible for Jones' death would have been relevant to the jury's determination of whether there existed a reasonable doubt as to the petitioner's guilt. Therefore, the failure to present this relevant, plausible third party culpability defense constituted deficient performance on the part of defense counsel under *Strickland*.

In addition, we conclude that in circumstances that largely involve a credibility contest, as did the petitioner's trial, "the testimony of neutral, disinterested witnesses is exceedingly important." *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995). While each habeas petition for ineffective assistance of counsel relies on its own unique set of facts, various state and federal decisions have addressed analogous circumstances. For example, in *Lindstadt v. Keane*, supra, 239 F.3d 203, the United States Court of Appeals for the Second Circuit concluded that the performance of the defendant's counsel was deficient, namely, because he failed to enter the testimony of two neutral probation officers who would have testified that the defendant's wife, who was the state's chief witness, had made numerous, unsubstantiated allegations of abuse against the

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[9] There is no requirement that the petitioner specifically name the alleged third party perpetrator. See *State v. Echols*, 203 Conn. 385, 389, 393–94, 524 A.2d 1143 (1987) (trial court improperly excluded evidence of third party look-alike despite unknown identity).

defendant in the hopes of having him reincarcerated.[10] See also *Pavel v. Hollins*, supra, 261 F.3d 222–23 (in "credibility contest," performance deficient, in part, because of failure to call neutral court-appointed mediator to support theory that mother manipulated children's testimony in effort to gain full custody); *Siano v. Warden*, 31 Conn. App. 94, 100–105, 623 A.2d 1035 (in conviction based on credibility of testimony of coconspirator, deficient performance for failure to call physician as lone neutral witness to testify that defendant was incapable of crime due to extensive injuries from recent motor vehicle collision), cert. denied, 226 Conn. 910, 628 A.2d 984 (1993).

At trial in the present case, the state's only evidence that specifically connected the petitioner to the assault was predicated entirely on the credibility of the eyewitness testimony of Fournier and Ewan Sharp.[11]

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[10] Interestingly, the other two aspects of the counsel's deficient performance in *Lindstadt* were the failure to show similar inconsistencies between the daughter's and the mother's testimony, and the failure to challenge the only medical evidence that supported the abuse, which was based on an unnamed study. *Lindstadt v. Keane*, supra, 239 F.3d 199–203. Similarly, in the present case, the testimony of Davis would have established inconsistencies with the eyewitness testimony of Fournier and Ewan Sharp, and the failure to offer the testimony of both Young-Duncan and Gartley, left unchallenged the principal medical evidence that supported the state's theory.

[11] We recognize that the strength of the state's case bears most significantly to our analysis under the prejudice prong of *Strickland*. The Supreme Court cautioned in *Strickland*, however, that "the principles we have stated do not establish mechanical rules." *Strickland v. Washington*, supra, 466 U.S. 696. With that guidance in mind, we further observe that inherent in an analysis

Fournier admitted that he had lied to the police during the investigation and that he had consumed approximately eighteen beers and an unknown quantity of cocaine on the night of the incident. Detective Steven Grabowski of the Hartford police department testified that, at the time, Fournier was "very uncooperative [and] intoxicated . . . ." A jury could have found that Sharp's testimony was equally suspicious. Sharp did not come forward until four years after the fact, and only while undergoing police interrogation for an unrelated felony. Moreover, the testimony of Fournier and Sharp was inconsistent as to critical facts: Fournier testified that the petitioner assaulted him in addition to attacking Jones, whereas Sharp testified that the petitioner did not assault Fournier. In the absence of the third party culpability evidence presented by neutral, credible witnesses, however, the jury was not presented with a plausible alternative to Sharp and Fournier's descriptions of the events.

In short, Smith's performance was deficient. The alternative theory raising a third party culpability defense was well supported by neutral, credible witnesses,[12] whose statements were made

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of whether counsel's actions were deficient, in part, because of a failure to call neutral witnesses in a credibility contest, there must be some initial inquiry into whether such a contest in fact existed. Accordingly, we set forth only so much with respect to the credibility of the state's two eyewitnesses to establish that such a credibility contest was present at the petitioner's trial.

[12] We also find it persuasive that the testimony of these four witnesses, three of whom were eyewitnesses and all of whom were independent, was not cumulative of the testimony of the only two

contemporaneous to the events.[13] This was not an alternative theory concocted years later by a defendant in a jailhouse cell, unsupported by credible evidence. Under our third party culpability rules, we conclude that the evidence was relevant, and could have raised a reasonable doubt in the minds of the jury as to the petitioner's guilt. The testimony would have called into question the most basic elements of the state's case: (1) that the petitioner was the individual who killed Jones; and (2) that Jones died as a result of a beating. In the light of all the circumstances, including the dubious credibility of the state's two eyewitnesses, the decision not to present the third party culpability defense fell below an objective standard of reasonableness, and,

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witnesses presented by trial counsel as part of the petitioner's defense, namely, a police officer, who testified that there was a police substation near the scene of the incident from which outdoor camera footage requests were never made, and the petitioner himself, who testified as to his presence at the scene. No witnesses at trial testified about gunshots, the presence of a white car and the unidentified Hispanic males, or to a possible gunshot wound to Jones. Cf. *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998) (per curiam) (witness would have corroborated another witness' testimony and counsel could have determined witness would have been unnecessarily cumulative), cert. denied sub nom. *Parise v. United States*, 526 U.S. 1164, 119 S. Ct. 2059, 144 L. Ed. 2d 224 (1999).

[13] Young-Duncan, Gartley and Fleury's statements were made to police on the day in question. While police also took Davis' statement on the day in question, that statement does not contain the statements regarding the circumstances surrounding the gunshot. Davis testified at the habeas hearing that the police were not interested in memorializing that portion of his account. He also testified that he told his full account to the petitioner's investigator. Moreover, Davis' original statement to police does not contain any account of an assault by the petitioner.

therefore, constituted deficient performance under the principles enunciated in *Strickland*.[14]

We are not persuaded by the state's argument that deference to trial strategy saves Smith's actions. While we acknowledge that the decision whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel; see *State v. Gore*, 288 Conn. 770, 779 n.9, 955 A.2d 1 (2008); it does not follow necessarily that, in every instance, trial counsel's strategy concerning these decisions is sound. As we have demonstrated previously in this opinion, in light of an objective standard, Smith's

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[14] The Appellate Court buttressed its conclusion that the petitioner did not satisfy the performance prong of *Strickland* because "[t]he petitioner did not indicate in either of his statements to the police, or in his testimony at his criminal trial, that there was an unknown gunman involved in the April 14, 1996 incident. Therefore, the presentation of a defense regarding an unknown gunman would have been rendered implausible by the petitioner himself. In fact, the [habeas] court noted that 'the petitioner's own testimony . . . seems to contradict the existence of [the] white Cadillac and a shooting . . . .' " *Bryant v. Commissioner of Correction*, supra, 99 Conn. App. 443. We disagree. Although the petitioner's trial testimony, and his statements to the police, do not reference a gunshot, a white vehicle or any Hispanic males, we do not view the absence of such information to be directly contradictory. If the petitioner had testified that there was no gunshot, that Jones had not been shot or that there was no white car in the area, that testimony would have been directly contradictory. It is possible, however, that the petitioner simply did not hear the gunshots or see the white vehicle and unidentified Hispanic males while he was hanging onto, or had just fallen off of, Fournier's Ford, which, according to Davis, was traveling between thirty-five and forty-five miles per hour. More importantly, as the habeas court noted, the petitioner may have chosen not to testify at all if these four witnesses had been presented at trial.

decision not to present these witnesses was unreasonable.[15]

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland v. Washington*, supra, 466 U.S. 691. To satisfy the second prong of

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[15] We briefly address the explanations proffered by Smith at the habeas hearing to the extent that the Appellate Court relied on those explanations to conclude that Smith's action constituted reasonable trial strategy. Smith claimed that: (1) he did not want to introduce the witnesses because evidence of a gun may have increased the petitioner's penalty range; and (2) the testimony of a gunshot, as established by Young-Duncan and Gartley, was unsupported by other evidence. First, the state did not charge the petitioner with the use of a firearm. Moreover, because manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a is not a lesser included offense of murder when the information does not allege that the murder was, in fact, committed with a firearm; *State v. Greene*, 274 Conn. 134, 159–60, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006); Practice Book § 36-18 would likely have prohibited the state from amending the charges against the petitioner. See *State v. Ramirez*, 94 Conn. App. 812, 817, 894 A.2d 1032 (Practice Book § 36-18 provides that state may amend information after commencement of trial as long as "no additional or different offense is charged and no substantive rights of the defendant would be prejudiced" [internal quotation marks omitted]), cert. denied, 278 Conn. 915, 899 A.2d 612 (2006). Second, the testimony of Young-Duncan and Gartley, which established the possibility of a gunshot wound, was, in fact, supported by other witnesses, namely, Davis, who testified that he heard gunshots immediately prior to the collision and who thereafter witnessed an unidentified Hispanic man with an object in his hand, and Fleury, who testified that Fournier stated that he had been involved in an incident with "three Hispanic males and a gun."

Strickland, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, "there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal." *Bunkley v. Commissioner of Correction*, 222 Conn. 444, 454, 610 A.2d 598 (1992), overruled in part on other grounds by *Small v. Commissioner of Correction*, 286 Conn. 707, 946 A.2d 1203 (2008). The second prong is thus satisfied if the petitioner can demonstrate that there is "a reasonable probability that, but for that ineffectiveness, the outcome would have been different." *Summerville v. Warden*, 229 Conn. 397, 430, 641 A.2d 1356 (1994); see also *Siano v. Warden*, supra, 31 Conn. App. 98.

Because the Appellate Court concluded that the petitioner had failed to satisfy the performance prong of *Strickland*, it did not reach the question of prejudice. The habeas court, for its part, concluded that, based on its findings, "there is clearly sufficient reason to doubt the reliability of [the jury's] verdict, based as it is upon incomplete evidence." We agree.

Foremost, while it is not necessary to repeat our analysis addressing the performance prong, suffice it to say that the third party culpability defense, as supported by the testimony of Davis, Young-Duncan, Gartley and Fleury, likely would have permeated to some degree every aspect of the trial and raised a reasonable doubt in the minds of the jury as to the

petitioner's guilt.[16] See *Strickland v. Washington*, supra, 466 U.S. 695–96 ("[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture"). That theory, when juxtaposed with the testimony of Fournier and Sharp, creates great doubt in the validity of the jury's verdict. See id., 696 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

As we previously have noted, in the present case, the only evidence directly connecting the petitioner to the attack was the eyewitness testimony of Fournier and Sharp. The record reveals, however, that both witnesses were subject to substantial impeachment evidence. First, Sharp never made a statement to police on the night of the incident, but rather made his statement four years later and only during an interrogation by the Hartford police department subsequent to an unrelated felony arrest. Only at that point did Sharp tell the police that he had witnessed the

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[16] We conclude that, even assuming that the use of Fleury's statement would be limited to impeachment purposes, pursuant to § 6-10 of the Connecticut Code of Evidence, the testimony of Davis, Young-Duncan and Gartley, coupled with that impeachment testimony, would have been sufficient to undermine the jury's verdict. Accordingly, and in light of the fact that Smith did not even attempt to introduce Fleury's statement, we need not reach the question of whether Fleury's statement would also have been admissible for substantive purposes. Rather, we leave that determination to the discretion of the trial court on remand.

petitioner beating Jones.[17] Sharp then testified at the petitioner's probable cause hearing in a manner largely consistent with the facts, as noted previously, that the Appellate Court relied on to reverse the habeas court. When it was Sharp's turn to testify at trial, however, Sharp refused. After the prosecutor offered Sharp transactional immunity, Sharp continued to refuse to testify and subsequently was held in contempt of court. Thereafter, the state read Sharp's probable cause testimony into the record. Second, at the time of the probable cause hearing, Sharp testified that he had four prior felony convictions, and had charges pending against him. Finally, Sharp testified that, at the time he allegedly witnessed the events, he was fourteen years old and was under the influence of marijuana.

Fournier's testimony was also vulnerable to impeachment evidence. To begin, on the night in question, Fournier also did not make any statements to police asserting that the petitioner had attacked Fournier or Jones. When police recontacted Fournier on or about February 21, 1997, he again failed to make any statements alleging an attack by the petitioner.[18] While on the witness stand, Fournier testified that he had at least one prior felony conviction and had various charges pending against him. In addition, Fournier admitted that at the time of the incident it was his and

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[17] Sharp testified that he did not give a statement to the police on the night in question.

[18] Fournier eventually testified in a manner consistent with the facts as noted by the Appellate Court.

Jones' intention to solicit the sale of cocaine and depart without paying for the contraband. Even more remarkable, Fournier testified on cross-examination that he had consumed as many as eighteen beers and an unknown quantity of cocaine on the night of the incident. Fournier then testified that he had lied to the police on multiple occasions during their investigation, specifically, that he had been the passenger and not the driver of the Ford,[19] and that he had given a false name to the police to avoid arrest on an outstanding warrant. Most importantly, as noted previously, the testimony of Sharp and Fournier diverged in one significant respect: Fournier testified that the petitioner had kicked him several times prior to the petitioner's alleged beating of Jones, whereas Sharp testified that he witnessed the entire incident and that Fournier "didn't get beat up. He was down by the package store."

Accordingly, not only was the testimony that linked the petitioner to the attack of dubious credibility, it also was internally inconsistent with respect to significant facts. While Katsnelson's testimony and report admittedly were strong evidence, they were not conclusive of the petitioner's guilt. Without the jury crediting the testimony of Sharp and Fournier, Katsnelson's conclusion that Jones died of blunt trauma, assuming it is correct, only supports the conclusion that Jones died of blunt trauma—it does not prove that the petitioner committed the attack. Nothing in the autopsy report permitted Katsnelson to point to the petitioner as the assailant, nor did Katsnelson do so

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[19] Fournier testified that he lied in order to avoid arrest for driving with a suspended license.

at trial. As a result, the failure to challenge the testimony of Fournier and Sharp with neutral, disinterested testimony was exceedingly damaging to the petitioner's defense.

Moreover, Katsnelson's testimony was not irrefutable. Though Katsnelson observed various injuries suffered by Jones that he concluded were inconsistent with a motor vehicle accident,[20] and testified that he did not find evidence of a gunshot wound,[21] the failure to call Young-Duncan and Gartley left Katsnelson's conclusion largely uncontested.[22]

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[20] At the time of the autopsy, Katsnelson was under the belief that Jones had been the driver. As it later turned out, Jones was in fact the passenger.

[21] The habeas court addressed this conclusion by observing that "[i]t is not impossible that with the force of the impact of the collision, coupled with a gunshot wound to the head, and emergency treatment at the trauma center that a severe fracturing of the skull might have masked the existence of the gunshot wound by the time of the postmortem examination."

[22] It is important to remember that Katsnelson's bald assertion that he "did not find any evidence of gunshot wounds" was never subjected to scrutiny on cross-examination. For example, Katsnelson was never asked whether he also had observed the wound that the two emergency medical technicians (and an unidentified Hartford police officer) believed was a gunshot wound, and, thus, never provided an explanation as to whether their belief was correct or incorrect. While Smith did cross-examine Katsnelson on his foundation, including: (1) his failure to assess the damage to the Ford; (2) his failure to visit the scene; (3) his failure to perform an accident reconstruction; and (4) his mistaken belief that Jones was the driver and not the passenger, the inclusion of the exculpatory testimony would have given the jury a strong basis to question Katsnelson's conclusion. We would also note that,

Without that testimony, the jury never had to reconcile how two trained emergency medical technicians observed a pencil sized entry and exit gunshot wound to the head moments after their arrival at the scene. Perhaps most importantly, while it is difficult to understand how the autopsy did not reveal a gunshot wound, it is equally difficult to explain how Davis, a former Marine and disinterested witness, who saw the entire incident, and testified that at no time did he lose consciousness, never saw a supposedly savage and deadly beating taking place in his presence.

On the basis of the foregoing, we conclude that but for the deficient performance of the petitioner's trial counsel, there was a reasonable probability sufficient to undermine confidence in the jury's verdict; *Strickland v. Washington*, supra, 466 U.S. 694; and, as a result, the petitioner received ineffective assistance of counsel in violation of his rights under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution.[23]

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significantly, defense counsel's reasons for not presenting these witnesses in the context of impeachment as well as a third party culpability theory are inadequate and unsatisfactory. See footnote 15 of this opinion. Defense counsel, who improperly feared introducing evidence of a gunshot, failed to offer the obvious challenges to Katsnelson's report.

[23] The concurring opinion emphasizes that one of our two grounds for reversing the judgment of the Appellate Court is that the testimony of the four witnesses, Davis, Young-Duncan, Gartley and Fleury, who were not called by defense counsel, would have supported a viable third party culpability defense. On the basis that such a defense may have been "weak," the concurring opinion argues that failing to call the witnesses for that purpose was not

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the habeas court.

In this opinion NORCOTT and VERTEFEUILLE, Js., concurred.

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ineffective assistance. While we disagree with the concurring opinion's characterization as to the strength of the third party defense, we also observe that the concurring opinion fails to note with appropriate emphasis that the other ground for reversal is that the failure to present those witnesses relinquished the opportunity for substantial impeachment of the state's case. Apparently, however, the concurrence is in accord on this ground, although it focuses solely on the testimony of one witness, Davis, whose absence alone, it argues, supports the showing of ineffective assistance of defense counsel. It is indisputable, in fact, that Davis is the principal witness whose testimony would directly support a third party culpability defense, as well as would impeach the testimony of various state's witnesses.

In response to the concurrence's conclusion that the majority opinion somehow "require[s]" future defense counsel to present a third party culpability defense or even that defense counsel will "be obligated" to raise it, we clarify that future defense counsel is by no means so "obligated" or "require[d]." Addressing the issue raised on appeal involves a retrospective view of the earlier trial and a determination that the failure to present the testimony of these exculpatory witnesses was not effective representation. The point is that defense counsel did not offer available evidence that would have countered both the state's claims that the petitioner was the assailant and that the victim was beaten to death. Defense counsel at a future trial, which, doubtless, will take place under substantially different circumstances, is free to proceed on the basis of his or her own assessment of the available evidence and, ultimately, his or her own judgment as to how to make use of this evidence.

SUPREME COURT

STATE OF CONNECTICUT

NO. SC 17896

BERNALE BRYANT

v.

COMMISSIONER OF CORRECTION : APRIL 21, 2009

ORDER

THE MOTION OF THE RESPONDENT-COMMISSIONER OF CORRECTION, FILED MARCH 25, 2009, FOR RECONSIDERATION AND REARGUMENT EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D **DENIED.**

BY THE COURT,
/s/ L. Jeanne Dullea

_____
ASSISTANT CLERK-APPELLATE

NOTICE SENT: APRIL 22, 2009
PETER TSIMBIDAROS, SPECIAL PUBLIC DEFENDER
MICHAEL E. O'HARE ASSISTANT STATE'S ATTORNEY
HON. STANELY T. FUGER, JR.
CLERK, JUDICIAL DISTIRCT TOLLAND AT SOMERS
(CV-030003933S)

bjm 376/080390